Supreme Court, U.S.
FILED
MAY 26 1995
CLERK

No. 94-1784

In The

Supreme Court of the United States

October Term, 1994

ROBERT A. AMATO,

Petitioner,

versus

THE OFFICE OF THE LOUISIANA COMMISSIONER OF SECURITIES, BRIDGER EGLIN IN HIS CAPACITY AS COMMISSIONER OF SECURITIES, AND HARRY C. STANSBURY IN HIS CAPACITY AS DEPUTY SECURITIES COMMISSIONER,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE UNITED STATES SUPREME COURT MUST DISMISS PETITIONER'S WRIT OF CERTIORARI FOR WANT OF JURISDICTION.

WHETHER IT IS PROPER FOR THE UNITED STATES SUPREME COURT TO REVIEW THE LOUISIANA FOURTH CIRCUIT COURT OF APPEALS' DECISION TO RECOGNIZE THE LOUISIANA STATUTORY IMMUNITY GRANTED THE LOUISIANA COMMISSIONER OF SECURITIES PURSUANT TO LSA-R.S. 51:720.

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Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Office of the Louisiana Commissioner of Securities, Bridger Eglin in his Capacity as Commissioner of Securities and Harry C. Stansbury in his Capacity as Deputy Securities Commissioner, Respondents, respectfully pray that a Writ of Certiorari to review the denial of a Writ of Certiorari by the Louisiana Supreme Court rendered on February 3, 1995 be denied.

STATUTORY PROVISIONS

The following statute, set forth in Appendix "A", and the related jurisprudence is the core premise of the alleged jurisdiction of the United States Supreme Court: 28 U.S.C. § 1257.

STATEMENT OF THE CASE

This case presented as a person (the petitioner) whose application for registration as a securities salesman in the State of Louisiana was not "passed upon" by the Louisiana Commissioner of Securities because the petitioner's sponsoring brokerage firm withdrew the petitioner's application for registration. The petitioner was without registration for approximately five (5) months at which time another securities broker submitted a complete registration application for the petitioner which was approved by the Louisiana Commissioner of Securities. Contrary to the petitioner's statement to this Court, this five (5) month delay did not cause a catastrophic impact on the petitioner's livelihood. As found by the Trial Judge, and not questioned by the petitioner, a January 1991 correspondence to the petitioner's clients from the Securities and Exchange Commission/National Association of Security Dealers did as much to destroy the plaintiff's customer base as did any alleged delays in his licensing by the Louisiana Commissioner of Securities.[1]

[1] Disciplinary action was taken against the petitioner by the National Association of Security Dealers (NASD) arising

The petitioner originally filed a petition seeking injunctive and declaratory relief in the Civil District Court for Orleans Parish, Louisiana, #91-6995, Div. "C" on April 10, 1991. Although the petitioner complained that the respondents' activities violated the petitioner's entitlement to due process as required by the *laws of the State of Louisiana* (emphasis added), nowhere in that original petition was it stated that the alleged activities of the respondents violated the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution. The petitioner filed a first amending and supplemental petition in the State District Court. Contrary to the petitioner's assertions to this Court, the petitioner had *not* (emphasis added) alleged a cause of action under

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from the same set of facts and circumstances as was included in the investigation by the Louisiana Commissioner of Securities in this matter. The Securities and Exchange Commission (SEC) affirmed the disciplinary action of the NASD. The petitioner sought a review before the United States Fifth Circuit Court of Appeals of the affirmance by the SEC of the disciplinary action taken against the petitioner by the NASD. The United States Fifth Circuit Court of Appeals found no error and affirmed. *Amato v. S.E.C.*, 18 F. 3d 1281 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 316 (1994). In fact, Mr. Amato's claim in the State Court against the respondents mirrors Mr. Amato's claim in the Federal Courts that he was singled out to be punished by the SEC. In the State claim, Mr. Amato alleges that the Louisiana Commissioner of Securities unduly pressured his sponsoring broker to withdraw his application for registration as a securities salesman. In the Federal claim, Mr. Amato complained that the NASD and the SEC wrongfully pressured Mr. Amato's sponsoring broker to "silence" any further letters of complaint to the regulatory authority. The petitioner further alleged that should he continue to complain to the NASD/SEC, his employment with his sponsoring broker would be terminated.

42 U.S.C. Sec. 1983. The petitioner failed to assert a violation of the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

Trial of this matter was had before the Honorable Max. N. Tobias on 30 August, 31 August, 1 September and 2 September, 1993. Judgment was rendered on September 20th, 1993 in favor of the respondents, finding that the respondents had not deprived the petitioner of any due process afforded by the Louisiana Constitution. The trial court dismissed the petitioner's suit.

The petitioner appealed this decision to the Louisiana Fourth Circuit Court of Appeals. Contrary to the petitioner's statement to this Court, a hearing was granted and oral argument was had by all parties before the Louisiana Fourth Circuit Court of Appeals. By judgment rendered October 3, 1994, the Louisiana Fourth Circuit Court of Appeals found the defendants to be absolutely immune pursuant to LSA – R.S. 51:720. Additionally, after reviewing the entirety of the record, the Louisiana Fourth Circuit Court of Appeals found the respondents to possess a qualified immunity in addition to absolute immunity. The Louisiana Fourth Circuit Court of Appeals recognized that the respondents filed an exception of lack of jurisdiction based upon the immunity granted by the Louisiana legislature in LSA-R.S. 51:720. That exception had been denied by the trial court in pre-trial motions/hearings. The Louisiana Fourth Circuit Court of Appeals also recognized that the respondents asserted the affirmative defenses of absolute and qualified immunities based upon the Louisiana Securities Law (LSA-R.S. 51:720) and the Louisiana Discretionary Acts Doctrine (LSA-R.S. 9:2798.1).

The petitioner sought rehearing before the Louisiana Fourth Circuit Court of Appeals on October 13, 1994, which was denied on November 15, 1994. In its appeal and application for rehearing before the Louisiana Fourth Circuit Court of Appeals, the petitioner did not allege a violation of the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

The petitioner then applied for a Writ of Certiorari before the Louisiana Supreme Court. The significant consideration presented to the Supreme Court was whether the immunity granted by LSA-R.S. 51:720 was unconstitutional in light of La. Const. Art. XII § 10-A. In the petitioner's statement of significant issues and assignment of errors, the petitioner did not allege that the actions of the defendant were in violation of the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution. The petitioner's Writ of Certiorari was denied on February 3, 1995.

It is from the decision of the Louisiana Fourth Circuit Court of Appeals and the refusal of the Louisiana Supreme Court to review the decision of the Louisiana Fourth Circuit Court of Appeals that the petitioner applies for a Writ of Certiorari to the United States Supreme Court.

At no time did the petitioner raise or preserve in the Louisiana State Courts the "due process", Section 1, Fourteenth Amendment federal constitutional issue. At no time did the Louisiana Courts "pass upon" the federal constitutional issue concerning the "due process" clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

In addition to the State Court suit, the petitioner subsequently filed a parallel complaint in the United States District Court for the Eastern District of Louisiana, Docket No. 91-4484 on December 10, 1991 against the same defendants.[2] This parallel Federal action was filed by the plaintiff subsequent to his filing suit in the Louisiana State Courts. Among the various exceptions filed, the respondents argued that the United States District Court should abstain from exercising its jurisdiction pursuant to the abstention doctrine enunciated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). The United States District Court agreed with the respondents and abstained upon the basis of the *Colorado River* abstention doctrine. Of all the *Colorado River* abstention factors considered, the United States District Court found the most important factor to be that the law governing the action in the Federal Court was primarily State law. Although the petitioner claimed that the respondents violated his Federal constitutional rights (this claim is made in the Federal suit only), the petitioner based that claim on the respondents' alleged failure to abide by the procedural and substantive State Securities Laws. The petitioner suggested to the United States District Court that his claim involved Federal issues in that it implicated the NASD investigation, which the petitioner contended involved issues of Federal law. The United States District Court found that petitioner's claims did not involve Federal

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[2] The United States District Court made explicit its recognition of the petitioner's choice to pursue his action in State Court first and the legal ramifications of that decision.

issues. Prior to this decision, the petitioner dismissed the Department of Economic Development, Office of the Louisiana Commissioner of Securities and Harry Stansbury in his capacity as Deputy Commissioner based upon the Eleventh Amendment immunities protecting these specific defendants from suit in Federal Courts. It is interesting to note that each and every one of the respondents herein are entitled to Eleventh Amendment immunity from suit in the Federal Courts.

Contrary to the petitioner's assertions, the United States District Court did **not** (emphasis added) specifically hold that the individual defendants waived their privilege of immunity. In fact, the United States District Court only presumed that the State agencies waived their immunity privileges in the State Court action. This statement was "dicta" and was not a holding of the court.

The United States District Court abstained from asserting jurisdiction and dismissed the plaintiff's complaint.

REASONS FOR DENYING CERTIORARI

I. 28 U.S.C. § 1257 AND THE JURISPRUDENCE RELATED THERETO MANDATE THAT THIS COURT DENY PETITIONER'S WRIT OF CERTIORARI FOR WANT OF JURISDICTION.

It is a long settled rule that the jurisdiction of the United States Supreme Court can arise only when the record as a whole shows either expressly or by clear

implication that the Federal claim was adequately presented in the State system. U.S. Sup. Ct. Rule 10.1(b)(c); 28 U.S.C. § 1257; *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 1892, 68 L. Ed. 2d 392 (1981).

It was established very early that the United States Supreme Court will not decide constitutional issues raised for the first time on review of State court decisions where the Federal question had not been raised, preserved or "passed upon" in and by the State courts. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161 (1969). *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973). *Estate of Thomas A. Wilson, et al. v. Aiken Industries, Inc.*, 439 U.S. 877, 99 S. Ct. 366, 58 L. Ed. 2d 191 (1978).

All specifications or assignments of error must be briefed. The court may consider as abandoned any specification or assignment of error which has not been briefed. Rule 2-12.4, Uniform Rules – Courts of Appeals for the State of Louisiana, Source: Louisiana Supreme Court, Rule 7, § 6.

The Court may consider as abandoned any assignment of error which has not been briefed. Rule 7, § 6 Supreme Court Rules for the State of Louisiana.

It is absolutely clear from the record and from the absence of any assertions in the petitioner's Petition for a Writ of Certiorari that the record as a whole does not expressly or by clear implication illustrate that a claim under the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution was adequately presented in the State Court system. Further it is absolutely clear that the State Courts did not "pass

upon" this Federal constitutional issue. In fact, pursuant to the Rules of the Fourth Circuit Court of Appeals and the Louisiana Supreme Court, the plaintiff's failure to brief a Federal constitutional issue would allow the courts to deem this issue abandoned by the plaintiff, if the plaintiff had in fact properly raised and preserved the Federal constitutional issue at any level in the State Courts.

As in *Webb* (supra), where the record discloses that the petitioner failed to properly raise his Federal claim in the State Court system and the highest Court of the State did not rule upon a Federal constitutional issue, the United States Supreme Court is without jurisdiction to decide the Federal issue, and accordingly the Petition for a Writ of Certiorari must be dismissed.

II. THE LOUISIANA FOURTH CIRCUIT COURT OF APPEALS HAS BEEN EMPOWERED BY THE LAWS OF THE STATE OF LOUISIANA TO REVIEW THE ENTIRETY OF THE RECORD ON APPEAL AND RENDER ANY JUDGMENT WHICH IS JUST, LEGAL AND PROPER. FURTHER, THE REASONING OF THE UNITED STATES DISTRICT COURT IN ITS ABSTENTION AND DISMISSAL OF THE PLAINTIFF'S PETITION DOES NOT HAVE ANY "RES JUDICATA" OR "COLLATERAL ESTOPPEL" EFFECT AS TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEALS AND DOES NOT BECOME THE "LAW OF THE CASE".

Article 2164 of the Louisiana Code of Civil Procedure empowers a State Appellate Court to render any judgment which is just, legal and proper upon the record on appeal. An authoritative comment under this Article

states that the purpose of this Article is to give the State Appellate Courts **COMPLETE FREEDOM** (emphasis added) to do justice on the record irrespective of whether a particular legal point or theory was made, argued or passed on by the court below. This Article insures that the "theory of the case" doctrine is not applicable to appeals. LSA-C.C.P. Art. 2164; *Grand Isle Campsites, Inc. v. Cheek*, 262 So. 2d 350 (La. 1972), *rehearing denied* (1972); *Norman v. Shreveport*, 141 So. 2d 903 (La. App. 2nd Cir., 1962), *rehearing denied* (1962); *Mansker v. Mansker*, 499 So. 2d 1174 (La. App. 5th Cir. 1986).

A hearing (oral argument) before the Louisiana Appellate Courts is a privilege and not a right, being totally within the Court's discretion to grant or deny a hearing once a party has properly requested a hearing (oral argument). Uniform Rules of Louisiana Courts of Appeal, Rule 2-11.4.

The abstention by the United States District Court is neither "res judicata" nor "the law of the case" between the parties. The abstention by the United States District Court did not bar the Louisiana Fourth Circuit Court of Appeals from recognizing the Louisiana Statutory Immunity granted to the Louisiana Commissioner of Securities. *Landry v. Thibaut*, 523 So. 2d 1370 (La. App. 5 Cir. 1988) *writ denied* 526 So. 2d 809 (La. 1988).

The doctrine of "collateral estoppel" as developed in common law precludes the re-litigation of issues actually decided in a prior suit between the parties on a different cause of action. "Collateral estoppel" is a doctrine of issue preclusion *alien to Louisiana law* (emphasis added)

and not recognized in the Louisiana Courts and Louisiana law. *Welch v. Crown Zellerbach Corp.*, 359 So. 2d 154 (La. 1978), *rehearing denied* (1978).

It is clear that the law of the State of Louisiana allows the State Appellate Courts to review the entire record and render any judgment which is just, legal and proper whether or not a particular legal point or theory was made, argued or "passed upon" by the Trial Court. In this matter, the Louisiana Fourth Circuit Court of Appeals rendered its judgment upon review of the entire record and after a hearing (oral argument) by all parties. This hearing was not a right of the petitioner but a privilege which was afforded.

Further, the legal ability of the Louisiana Court of Appeals to review the trial record and to render a judgment whether or not a particular point or theory was made, argued or "passed upon" by the Court below is not barred by the reasoning of the United States District Court. The abstention by the United States District Court and the dismissal of the petitioner's complaint and the reasons for such abstention and dismissal cannot bind the Louisiana Fourth Circuit Court of Appeals. Abstention by the United States District Court is neither "res judicata" nor the "law of the case". Nor can the State Appellate Courts be "collaterally estopped" by the reasoning of the United States District Court. In addition, the United States District Court did not hold that the defendants had specifically waived their privilege of immunity. The United States District Court had only presumed in dicta that the State agencies had waived their immunity. Further, the United States District Court held that the most

important reason for abstaining and dismissing the petitioner's complaint was that the issues to be litigated were those primarily of State law.

As such, the Louisiana Fourth Circuit Court of Appeals was empowered to review the entire record and to render its judgment. The Louisiana Fourth Circuit Court of Appeals was not barred by the reasoning of the United States District Court for its abstention and dismissal of the petitioner's complaint. As such, it is not proper for the United States Supreme Court to review the Louisiana Fourth Circuit Court of Appeals' decision to recognize that the Louisiana Commissioner of Securities was entitled to the Louisiana statutory immunity granted by the Louisiana Legislature by means of LSA-R.S. 51:720.

CONCLUSION

The petitioner is attempting to have the United States Supreme Court review the decision of the Louisiana Fourth Circuit Court of Appeals of a matter which is purely State law. At all levels in the State Courts, the petitioner failed to allege and brief a violation of the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution. None of the State Courts considered a Federal question in reaching their decisions. It was proper and within the authority of the Louisiana Fourth Circuit Court of Appeals to review the entire record and render the judgment that it did. In addition, the instant matter concerns a decision based entirely upon State law, and a determination of this State

law has not been "passed upon" by the highest Court of Louisiana.

The Office of the Louisiana Commissioner of Securities, Bridger Eglin in his capacity as Commissioner of Securities, and Harry C. Stansbury in his capacity as Deputy Securities Commissioner, Respondents, respectfully pray that the Writ of Certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeals and the decision of the Louisiana Supreme Court to deny the Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

28 U.S.C.

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.